CHONG CHIENG JEN v. DATO SRI FONG JOO CHUNG

HIGH COURT SABAH & SARAWAK, KUCHING
SUPANG LIAN J
[CIVIL APPEAL NO: KCH-12A-5/5-2018(HC 1)]
27 NOVEMBER 2018

CIVIL PROCEDURE: *Parties – Action – Defamation action – Application by Sarawak State Attorney General ('SAG') to appear and participate as amicus curiae – Whether personal action which did not involve public issue – Whether action would require assistance of SAG in interpretation of document – Whether participation of SAG warranted – Whether appearance of SAG would lead to claim of prejudice*

This was the appellant's ('defendant') appeal against the dismissal by the Sessions Court Judge ('SCJ') of the defendant's objection to the application by the Sarawak State Attorney General ('SAG') to appear and participate as an *amicus* in the plaintiff's action for defamation against the defendant. The plaintiff was the State Legal Counsel in the action between Keruntum Sdn Bhd against the Government of the State of Sarawak & Ors ('Keruntum'). The High Court dismissed the action. Keruntum's appeal to the Court of Appeal was dismissed, and the Federal Court ('FC') upheld the decision of the Court of Appeal. Keruntum thus filed an application pursuant to the Rules of the Federal Court 1995 for an order that the decision of the FC be reviewed and set aside, contending that there was a *coram* failure as the FC panel was not duly constituted. However, the application was dismissed by the FC on 7 December 2017. On 5 December 2017, the defendant published a press statement and made remarks on the submissions made by the State Government's legal advisor on behalf of the State Government of Sarawak in the FC in the Keruntum case. The defendant's statements were published in the Borneo Post newspaper, Borneo Post online and The Malaysian Insight, which led to the defamation action by the plaintiff against the defendant. The SAG raised a preliminary objection that the appeal was incompetent because the decision of the SCJ was not appealable as the ruling was made in the course of a hearing or a trial, and since the ruling did not dispose of the rights of the parties, it did not fall under the definition of an appealable 'decision' under s. 3 of the Courts of Judicature Act 1964.

Held (allowing appeal):

(1) The ruling in the Sessions Court was made at the conclusion of a hearing of an application from the SAG; whereby the court had read and heard the submissions from both parties and deliberated on them. Upon the determination by the lower court, the SAG was cloaked with the authority to appear in the present action. The effect of the decision did not only finally determine the right of the SAG to appear as *amicus curiae* in so far as the lower court was concerned, it also finally disposed of the

rights of the appellant to challenge the application in the lower court to appear in the present suit. The decision of the SCJ was thus appealable and the preliminary objection was dismissed. (paras 15 & 16)

(2) The principles of law and practice of defamation are well-settled and straight forward. The present action was instituted by the plaintiff in his personal capacity and as an individual. No *amicus* was needed to assist and advise the court. Further, it was fallacious to contend that the present action would require any assistance in regard to interpretation and application of the Report of the Inter-Governmental Committee 1962 ('IGC Report') and Malaysia Agreement 1963 as the contents and the application in law were not the subject matter in the action. Also, the claim for damages for libel was a personal action, and therefore, there was no matter of public issue which warranted the participation of the SAG. (paras 21-23)

(3) An *amicus curiae* is one who voluntarily, or on the invitation of the court, and not on the instructions of any party, helps the court in any judicial proceedings. A party who has interest or is involved directly or indirectly in the subject matter of the action could not be appointed to act as an *amicus curiae* of the court. The plaintiff was once the State Attorney General of Sarawak, had acted as counsel of the State Government of Sarawak in the Keruntum case in the Federal Court and the State Government of Sarawak was involved or may be involved in the matter. Hence it was open to perception that the SAG, once appointed as an *amicus*, will become a friend of the plaintiff and not a friend of the court. That would lead to claims of prejudice to the defendant's case. Hence, the SAG's application for *amicus curiae* was denied. (paras 24-26)

Case(s) referred to:

Atip Ali v. Josephine Doris Nunis & Anor [1986] 1 CLJ 320; [1986] CLJ (Rep) 283 HC ***(refd)***

Christopher Ak Bandi @ Josny v. Tumbung Ak Nakis & Anor (Jamil Sindi, Third Party) [2015] 1 LNS 784 HC ***(refd)***

Jerry WA Dusing & Anor v. Majlis Agama Islam Wilayah Persekutuan & Ors [2017] 1 CLJ 133 CA ***(refd)***

Samsudin Ismail & Ors v. Yeoh Oon Theam & Ors and Another Case [2003] 1 LNS 368 HC ***(refd)***

Sherdly v. Sherdly [1982] 2 WLR 10 ***(refd)***

Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd [2003] 2 CLJ 177 CA ***(dist)***

Tai Choi Yu v. Ian Chin Hon Chong [2002] 2 CLJ 259 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 3, 16, 17
Federal Constitution, art. 128
Rules of Court 2012, O. 55
Rules of the Federal Court 1995, r. 137

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 28, p 13

For the appellant - Chong Siew Chiang, Tan Kee Heng & Michael Kong; M/s Chong Brothers Advocs
For State Attorney-General Sarawak - Mohamad Muhaimin Zakaria; State Legal Officer, Sarawak

Reported by S Barathi

JUDGMENT

Supang Lian J:

Background Facts

[1] The plaintiff (Dato Sri Fong Joo Chung) is the State Legal Counsel in the action between *Keruntum Sdn Bhd v. The Government of the State of Sarawak & 2 Ors*. The case was in respect of an alleged wrongful revocation of Keruntum Sdn Bhd's ("Keruntum") Forest Timber Licence No. T/0279 by the Sarawak State Government and others.

[2] Keruntum's action was dismissed by the High Court. On appeal by Keruntum, the Court of Appeal dismissed the appeal. On further appeal, the Federal Court on 15 March 2017 upheld the decision of the Court of Appeal and dismissed Keruntum's appeal with costs.

[3] On 24 March 2017, Keruntum filed an application pursuant to Rules of the Federal Court 1995 ("Rule 137 review application") for an order that the decision of the Federal Court given on 15 March 2017 be reviewed and set aside.

[4] In the r. 137 review application proceedings, counsel for the applicant (Keruntum Sdn Bhd) contended that, "There was a coram failure as the Federal Court panel was not duly constituted. At the material time, there was no member of the panel who is a judge of Borneo and therefore with Borneo experience. In light of the aforesaid, the appellant's position is that there was a violation of art. 128 of the Federal Constitution, read together with para 26(4) of the Report of the Inter-Governmental Committee 1962." ("IGC Report")

[5] The plaintiff, who acted as the legal counsel for the Government of Sarawak and two others, submitted *inter alia*, that:

(i) the recommendation in para 26(4) of the IGC Report was never implemented under Article VIII of the Malaysia Agreement 1963;

(ii) the said recommendation in para 26(4) was never implemented by an express provision in the Federal Constitution nor by any legislative, executive or other action by the Governments of the Federation of Malaya, North Borneo (Sabah) and Sarawak. Article VIII of the

Malaysia Agreement did not mandate the Judiciary to take action to implement the said recommendation. As such, the recommendation in para 26(4) cannot be enforced by the courts whether by a decision made in this application or by way of rules made pursuant to ss. 16 and 17 of the Courts of Judicature Act 1964;

(iii) since the said recommendation of the IGC has not and was never implemented under Article VIII of the Malaysia Agreement, the applicant cannot claim any legal right to have a "Judge with Bornean experience" in the FC appeal panel when its appeal was heard and decided by the Federal Court;

(iv) the IGC in its report at para. 26(4) did NOT impose a mandatory requirement that where the Federal Court is hearing or disposing an appeal origination from a Borneo State, the FC appeal panel must have a "Judge with Bornean judicial experience";

(v) the said recommendation was never and still has not been implemented by the Governments of Malaya, Sabah and Sarawak in accordance with the provisions of Article VIII of the Malaysia Agreement or by any express provisions of the Federal Constitution. Neither has the said recommendation been incorporated into any laws relating to the powers, jurisdiction and procedures or rules of the Courts in Malaysia, such as the Courts of Judicature Act 1964; and

(vi) by reasons above, the applicant has no legal rights to enforce or implement the said recommendation to have a judge with Bornean judicial experience to hear and decide on its appeal which originated from Sarawak.

[6] The Federal Court, having heard the legal counsel for the plaintiff and read the written submission, accepted and agreed with the submission. Therefore, Keruntum's application was dismissed with costs on 7 December 2017.

[7] On 5 December 2017, the defendant (Chong Chieng Jen) published a press statement and made remarks on the submissions made by the State Government's legal advisor in August 2017 on behalf of the State Government of Sarawak in the Federal Court in *Keruntum*'s case. The defendant's statements were published in the Borneo Post newspaper, Borneo Post online and The Malaysian Insight. As a result of the publication, the plaintiff brought the present action in the Sessions Court for libel against the defendant.

The SAG's Written Request

[8] The Sarawak State Attorney General ("SAG") (a stranger to the defamation action) on 14 February 2018 wrote a letter to the Sessions Court applying for leave of the court to appear and participate in the plaintiff's action as an *amicus*. This request by the chambers includes being *amicus*

curiae in the trial and any interlocutory applications of the said suit. The SAG's ground for the application for an *amicus* is that the subject matter in the present action involves or may involve the State Government's action, stance and approach in achieving more autonomy for the State of Sarawak and the defence of the State's constitutional rights.

[9] The defendant opposed the SAG's application and the objection was dismissed by the Sessions Court Judge on 30 April 2018. Hence, this appeal to the High Court under O. 55 of the Rules of Court 2012.

SAG's Preliminary Objection

[10] The chambers argues that the appeal is incompetent because the decision of the SCJ is one that is not appealable. Section 3 of the Courts of Judicature Act 1964 ("CJA") defines an appealable decision as a "judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties". In *Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd* [2003] 2 CLJ 177; [2003] 2 MLJ 495 the Court of Appeal stated:

> … one needs to merely look at the cold print of s. 3 of the Act … to see that any ruling made in the course of a trial or hearing of any cause and matter, which does not finally dispose the rights of the parties, does not constitute a decision for the purpose of s. 3 of the Act, … Equal weight should be attached to the entire sentence of s. 3 of the Act … for what must be asked is not only whether a ruling does not dispose the final rights of the parties but also the question whether it was a ruling made in the course of a trial or hearing of any cause or matter, regardless of the fact that it did not dispose of the rights of the parties, it may not be excluded by the definition of "decision" as provided in s. 3 … and is therefore appealable.

[11] The chambers submits that its request to be an *amicus* was made in the middle of the hearing of interlocutory applications filed by both the appellant and respondent. Given that the ruling was made in the course of a hearing or trial and the ruling also did not dispose of the rights of the parties, it could not come under the definition of an appealable "decision" under s. 3 of the CJA. Another case cited in support is *Christopher Ak Bandi @ Josny v. Tumbung Ak Nakis & Anor (Jamil bin Sindi, Third Party)* [2015] 1 LNS 784; [2015] 11 MLJ 597.

Finding

[12] The appellant has replied to the preliminary objection and with respect, I am more inclined to agree with the submission of the appellant on this point.

[13] It must be borne in mind that pursuant to the learned SCJ's decision on 30 April 2018 to allow the SAG to appear as *amicus curiae*, the right of the appellant to stop the SAG from appearing in the present action between the plaintiff and the defendant has come to an end. In my judgment, the

Sessions Court's ruling does finally determine the right of the SAG to attend as *amicus curiae* and therefore is appealable. In *Samsudin Ismail & Ors v. Yeoh Oon Theam & Ors and Another Case* [2003] 1 LNS 368; [2003] 6 MLJ 596, VT Singham J held that if a decision was given at the conclusion of the hearing of an interlocutory application on its merits and if the decision had finally disposed of the rights of the parties, the aggrieved party cannot be denied the right of appeal as it was not a ruling made in the course of hearing the interlocutory application but rather, a decision made at the conclusion of the hearing of the interlocutory application on its merits. I respectfully agree with the views expressed by the learned judge in this case.

[14] In my opinion, the facts of *Syarikat Tingan Lumber, supra*, can be distinguished. In that case, the appeal revolved around the admissibility of evidence. The Senior Assistant Registrar made a decision whilst in the course of hearing and this decision did not dispose the appellant's rights in the trial itself. The Court of Appeal held that what must be asked was not only whether a ruling had disposed the final rights of the parties but also whether it was a ruling made in the course of a trial or hearing of any cause or matter, for if it was not a ruling made in the course of a trial or matter, then regardless of the fact that it did not dispose of the rights of the parties, it may not be excluded by the definition of 'decision' as provided in s. 3 of the CJA. In other words, if the decision does finally determine the rights of the party, it is appealable.

[15] In our present case, the ruling in the Sessions Court was made at the conclusion of a hearing of an application from the SAG; whereby the court had read and heard submissions from both parties and deliberated on it. Upon the determination by the lower court, the SAG is now cloaked with the authority to appear in the present action. It is against this decision that the appellant is appealing. To my mind, the effect of the decision not only finally determined the right of the SAG to appear as *amicus curiae* in so far as the lower court is concerned, it also does finally dispose of the rights of the appellant to challenge the application in the lower court to appear in the present suit. In my judgment, the decision of the learned SCJ is indeed appealable.

[16] The preliminary objection is dismissed.

Amicus Curiae

[17] The chambers contends that it has no direct interest in the dispute between the appellant and the respondent. However, the subject matter involves and may involve public interest. This has led the chambers to make the request in order to assist the court in the capacity of *amicus curiae*. In *Jerry WA Dusing & Anor v. Majlis Agama Islam Wilayah Persekutuan & Ors* [2017] 1 CLJ 133; [2017] 1 MLJ 216, the court decided that, "Where a party does not have a right to intervene but the court takes the view that the importance

of the questions involved in the proceedings; the intervention as *amicus curiae* is permissible." In *Tai Choi Yu v. Ian Chin Hon Chong* [2002] 2 CLJ 259; [2002] 5 MLJ 518 Sulaiman Daud JC (as he was then) observed:

> An *Amicus curiae* is defined as a friend of the court, being a person who voluntarily or on invitation of the Court, and not on the instruction of any party helps the court in any judicial proceedings. In the instant case, notwithstanding that the senior federal counsel had volunteered to help the court in her capacity as *amicus curiae*, she could only be heard if invited by the Court to do so. However, any suit against a judge for an alleged libel contained in his written judgment would undoubtedly involved a matter of public interest ...

[18] It is submitted that since an *amicus curiae* could only be heard if invited by the court to do so, any argument connoting that the appearance of the chambers as *amicus curiae* would likely prejudice any of the parties surely could not and does not hold any water.

Finding

[19] The appellant as well has submitted on this issue and I respectfully agree with the appellant's submission.

[20] Firstly, the present case is an ordinary defamation suit with the purpose of vindicating the reputation of the person allegedly defamed. It is a claim for damages for libel, which is a personal action: see *Atip Ali v. Josephine Doris Nunis & Anor* [1986] 1 CLJ 320; [1986] CLJ (Rep) 283; [1987] 1 MLJ 82 at pp. 85-86. The main issues to be tried are:

(a) Whether the words complained of are capable to be defamatory;

(b) Whether there was a publication;

(c) Whether the words complained of were published to a third party; and

(d) Whether the defendant is protected by any of the defences available.

[21] To state the obvious, the principles of law and practice of defamation are well settled and straight forward. There is no necessity to seek the advice or assistance of an *amicus*. The present action is instituted by the plaintiff in his personal capacity and as an individual. As stated earlier, defamation is a personal action maintainable by the person actually defamed and will not give rise to the right on the part of other person(s) to sue. The principles of the law of defamation being well settled, no *amicus* is needed, in my view, to assist and to advise the court.

[22] That being so, I respectfully say that it is fallacious to contend that the present action will require any assistance in regard to interpretation and application of the IGC Report and MA63. It is also clear that there is no need to even deliberate on the contents of the IGC Report or MA63 for the simple reason that its contents and application in law are not the subject matter in the present action.

[23] As regards the element of public interest as the chambers has contended, in my opinion, since a claim for damages for libel is a personal action, there is no matter of public issue which warrants the participation of the SAG. As stated in *Halsbury's Laws of England*, 4th edn, vol. 28 at p. 13, "the proper purpose of an action of libel or slander is to vindicate the reputation of the person defamed, and accordingly the proper and only party to bring the action is the person actually and personally defamed."

[24] Secondly, an *amicus curiae* (a friend of the court) is one who voluntarily or on the invitation of the court, and not on the instructions of any party, helps the court in any judicial proceedings: see *P Ramanatha Alyar*'s *The Law Lexicon*, 2nd edn, 1997. A party who has interest or is involved directly or indirectly in the subject matter of the action cannot be appointed to act as an *amicus curiae* of the court. If such a person is appointed as an *amicus*, then he is not a friend of the court but a friend of the party to the cause of the action: see *Sherdly v. Sherdly* [1982] 2 WLR 10.

[25] It is common ground that the plaintiff was once the State Attorney General of Sarawak, had acted as counsel for the State Government of Sarawak in *Keruntum*'s case in the Federal Court and as admitted by the learned SAG, the State Government of Sarawak is involved or may be involved in the matter. That being the case, it is open to perception that the SAG once appointed as an *amicus* will become a friend of the plaintiff, and not a friend of the court. That will lead to claims of prejudice to the defendant's case.

Conclusion

[26] As stated earlier, the plaintiff's case against the defendant is a straight forward defamation suit and there is no necessity to seek assistance of the State Attorney General to participate as *amicus curiae*. It has not been shown how the chambers' personal and subjective interpretation of the IGC Report and MA63 is of any assistance towards a claim of defamation. For the reasons stated above, the State Attorney General's application for *amicus curiae* is denied. The appeal is accordingly allowed with costs of RM3,000.